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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF INDIANA,

Intervenor-Appellant,

vs.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF OF INTERVENOR-APPELLANT
STATE OF INDIANA**

JOHN F. PRITCHARD

Counsel of Record

GILBERT R. HOY, JR.

PETER E. MAHONEY

JAMES A. MEADE

of

WINTHROP, STIMSON, PUTNAM

& ROBERTS

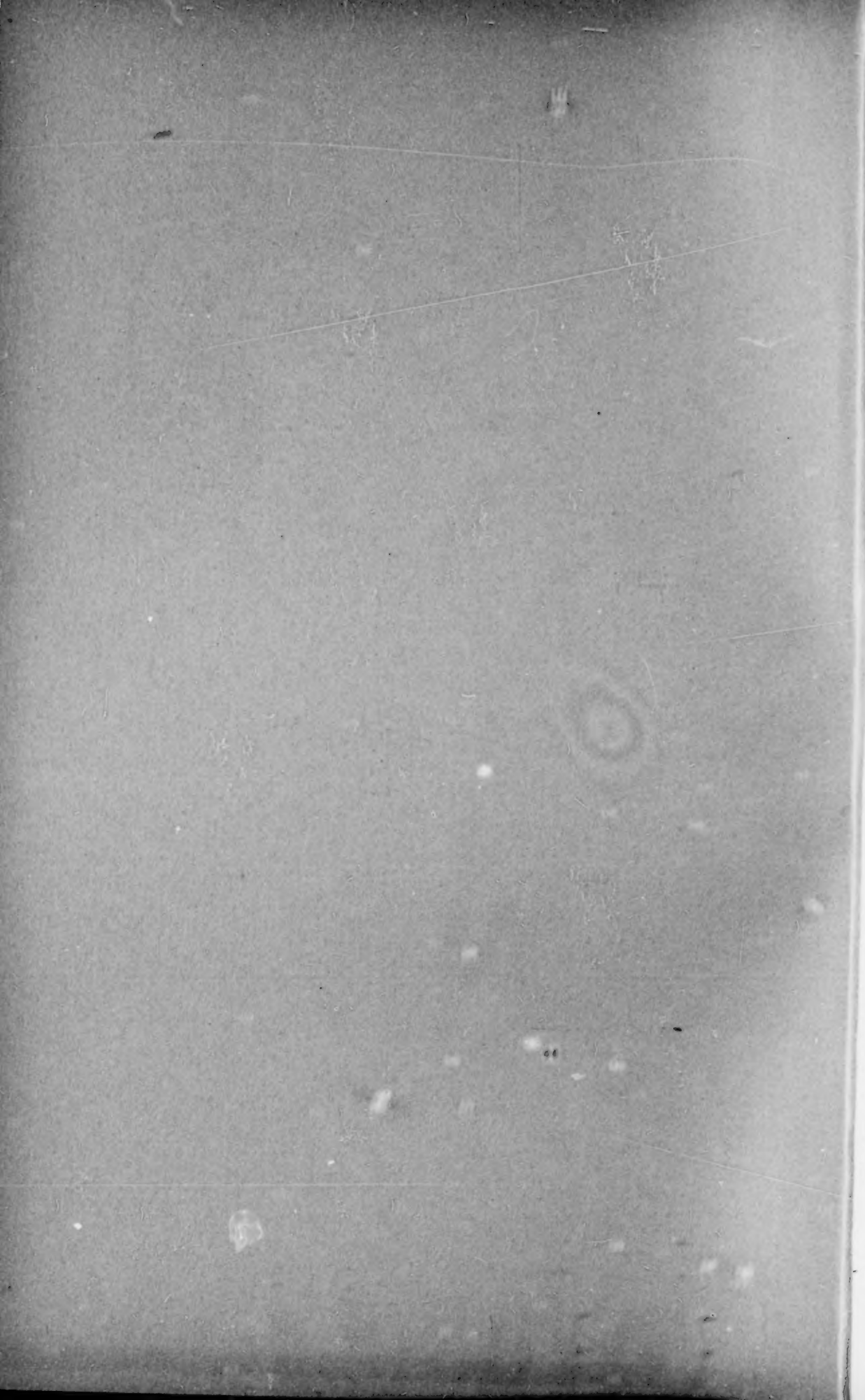
40 Wall Street

New York, New York 10005

(212) 943-0700

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QUESTIONS PRESENTED

1. Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of existing shareholders, is unconstitutional under the Supremacy Clause of the Constitution of the United States, U.S. Const. art. VI, cl. 2, because preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1982 & Supp. III 1985), which federal statute regulates only

disclosures to shareholders and the purchase of shares in tender offers.

2. Whether the Control Share Acquisitions Chapter, which does not discriminate against interstate commerce or out-of-state residents, applies only to Indiana corporations with other substantial ties to the State, and regulates shareholder voting rights as a matter of the State's general corporation law governing the internal affairs of Indiana corporations, is unconstitutional under the Commerce Clause of the Constitution of the United States, U.S. Const. art. I, § 8, cl. 3.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was issued on April 9, 1986. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389 (N.D. Ill. 1986). It is contained in the Appendix to the Jurisdictional Statement filed with this Court by Appellant CTS Corporation in Docket No. 86-71, which appeal has been consolidated with the instant appeal. (CTS App. A29)* The supplemental opinion of the District Court was issued on April 16, 1986. Dynamics Corp. of

* References to "(CTS App. _____)" are to the Appendix submitted in connection with the Jurisdictional Statement of CTS Corporation, upon which the Intervenor-Appellant relies.

America v. CTS Corp., 637 F. Supp. 389,
400 (N.D. Ill. 1986) (CTS App. A88).

The final opinion of the United States
Court of Appeals for the Seventh Circuit
was issued on June 9, 1986.* Dynamics

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- * Rule 15.1.(b) LISTING: In Seventh
Circuit No. 86-1601, containing the
constitutional issues presented by
this appeal, the parties were
Dynamics Corporation of America
("DCA") as Plaintiff-Appellee; CTS
Corporation ("CTS") and Robert
Hostetler, Gary Erikson, and Joseph
DiGirolamo, in their respective
capacities as officers and/or
directors of CTS, as Defendants-
Appellants; and the State of Indiana,
as Intervenor-Appellant. Seventh
Circuit No. 86-1608 involved the same
action in the District Court, and
was consolidated with No. 86-1601 for
decision by the Seventh Circuit (CTS
App. A13), but did not involve the
questions presented in this appeal.

Rule 28.4.(c) Listing: By its
Memorandum Opinion and Order in
Dynamics Corporation of America v.
CTS Corporation, 637 F. Supp. 389,
406 (N.D. Ill. 1986), the United
States District Court for the
Northern District of Illinois,
Eastern Division, certified the

Corp. of America v. CTS Corp., 794 F.2d
250 (7th Cir. 1986) (CTS App. A1).

JURISDICTION

This civil action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, by Appellee Dynamics Corporation of America ("DCA") against Appellant CTS Corporation ("CTS") and others. As relevant to this appeal, the complaint alleged that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp.

(footnote continued)

judgment in that case for immediate appeal and certified "the appeal" under 28 U.S.C. § 2403(b) (1982) to the Indiana Attorney General for purposes of intervention. (CTS App. 125).

1986) (the "Indiana Statute"), is unconstitutional because it violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the Constitution of the United States. Federal jurisdiction was based upon 15 U.S.C. § 78aa, 28 U.S.C. §§ 1331 and 1332 (1982), and the doctrine of pendent jurisdiction.

In its opinions dated April 9 and 16, 1986 the District Court held the Indiana Statute unconstitutional, 637 F. Supp. 389 (CTS App. A88), and on April 16, 1986 it entered judgment in favor of DCA on this issue and certified its judgment for immediate appeal under 28 U.S.C., Fed. R. Civ. P. 54(b) (1982). 637 F. Supp. at 406 (CTS App. A124, A139). By that same opinion the

District Court also for the first time certified the appeal to the Attorney General of the State of Indiana pursuant to 28 U.S.C. § 2403(b) (1982). Id. (CTS App. A124-25). That statute provides that a state is entitled to intervene in any action, suit or proceeding in a court of the United States "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question." The Indiana Attorney General did not receive certification pursuant to 28 U.S.C. § 2403(b) until after the conclusion of proceedings in the District Court and was unable to present evidence or argument in the action. 637 F. Supp. at 400 (CTS App. A89).

On April 19, 1986, Intervenor-Appellant filed a motion to intervene in

an appeal taken by CTS to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") from the judgment of the District Court entered in accordance with its opinions holding the Indiana Statute to be unconstitutional on both Supremacy and Commerce Clause grounds. (App. A7).^{*} The Seventh Circuit issued an order granting the State's motion to intervene on April 22, 1986. (App. A11). On April 23, 1986, the Seventh Circuit entered its judgment and an order affirming the judgment of the District Court (CTS App. A126, A129) and on June 9, 1986 issued its opinion addressing

* References to "(App. ____)" are to the Appendix filed by Intervenor-Appellant State of Indiana with its Jurisdictional Statement.

the constitutional issues presented.
794 F.2d 250 (CTS App. A1).

The State of Indiana timely filed a notice of appeal to this Court in the Seventh Circuit on April 25, 1986. (App. A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First and Sixth Articles of the United States Constitution, the Williams Act of 1968 and the Indiana Business Corporation Law are set forth at page A140 of the Appendix to the Jurisdictional Statement of Appellant CTS Corporation filed in connection with its Jurisdictional Statement in Docket No. 86-71, which appeal has been consolidated with this appeal.

STATEMENT OF THE CASE

Appellee Dynamics Corporation of America ("DCA"), a New York corporation with its principal place of business in Connecticut, announced a tender offer on March 10, 1986, for at least 1,000,000 of the approximately 5,700,000 outstanding voting shares of Appellant CTS Corporation ("CTS"), an Indiana corporation with its principal place of business in Indiana. As DCA already owned approximately 9.6% of CTS' outstanding voting shares, consummation of the tender offer would have given it approximately 27.5% of such shares. On the same date DCA announced a proxy contest to elect its own candidates to the CTS board of directors at CTS' annual meeting scheduled for April 25, 1986.

On March 10, 1986, DCA filed this action, which originally alleged claims unrelated to this appeal, in the United States District Court for the Northern District of Illinois, Eastern Division. Upon CTS' election to be governed by the new Indiana Business Corporation Law, including the Control Share Acquisitions Chapter described below, DCA amended its complaint to seek an injunction against enforcement of that Statute on the ground that its provisions are unconstitutional under the Supremacy and Commerce Clauses of the Constitution.

On March 4, 1986, Indiana enacted a new Business Corporation Law, Ind. Code Ann. §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), which revises the State's corporation code and which

contains a chapter entitled "Control Share Acquisitions." Ind. Code Ann. §§ 23-1-42-1 to -11 (CTS App. A167) (the "Indiana Statute"). While the new law becomes applicable to all Indiana corporations on August 1, 1987, corporations may elect to be governed by its provisions prior to that date. Ind. Code Ann. § 23-1-17-3. CTS elected to be governed by the new law effective April 1, 1986. Dynamics Corp. v. CTS Corp., 637 F. Supp. at 391 (CTS App. A33).

The Statute does not govern or regulate tender offers for shares of subject Indiana corporations, nor the purchase, sale or transfer of such shares. Rather, it supplements the portions of the new Indiana Business Corporation Law governing voting rights

of shareholders of Indiana corporations. The Statute governs the voting power of "control shares" of Indiana corporations, which are defined as acquired voting shares which, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power--20%, 33.3% or 50%. Ind. Code Ann. § 23-1-42-1. A person who acquires control shares may not vote them until the shares are granted voting rights by a majority vote of the existing disinterested shareholders. Ind. Code Ann. § 23-1-42-5 to -9. The procedure for obtaining the requisite shareholder vote is described below.*

* See infra, discussion at 31. ➡

The Indiana Statute applies to any Indiana corporation* with 100 or more shareholders that has its principal place of business, its principal office, or substantial assets within Indiana. Application of the Statute is further limited to corporations in which a substantial number of the shares are held by, or a substantial number of

* The term "corporation" is defined for purposes of the Business Corporation Law, including the Control Share Acquisitions Chapter, as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this Article." Ind. Code Ann. § 23-1-20-5. The Seventh Circuit recognized in its opinion that the Control Share Acquisitions Chapter applies only to corporations "incorporated in Indiana." 794 F.2d at 260 (CTS App. A19). See also Ind. Code Ann. § 23-1-49-5(c) ("This article does not authorize Indiana to regulate the organization or internal affairs of a foreign corporation authorized to transact business in Indiana.").

shareholders are, Indiana residents.

Ind. Code Ann. § 23-1-42-4(a).

Corporations may elect not to be subject to the Statute. Ind. Code Ann.

§ 23-1-42-5.

The United States District Court for the Northern District of Illinois, Eastern Division, and, on appeal, the United States Court of Appeals for the Seventh Circuit, ruled that the Indiana Statute is unconstitutional under the Supremacy and Commerce Clauses of the Constitution.

SUMMARY OF ARGUMENT

A. 1. The Indiana Statute, which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of existing shareholders, is not unconstitutional under the Supremacy

Clause because preempted by the Williams Act, a federal statute which regulates certain aspects of tender offers. The provisions of the Indiana Statute do not conflict with those of the Williams Act. The unambiguous language of Section 28 of the Securities Exchange Act of 1934 (of which the Williams Act is an integral part) requires a finding that the Williams Act does not preempt state laws which, like the Indiana Statute, are not inconsistent with its actual provisions.

2. The court below rested its preemption holding on its conclusion that the Indiana Statute "stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

It reasoned that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that states may not upset." Dynamics Corp. v. CTS Corp., 794 F.2d 250, 262 (7th Cir. 1986) (CTS App. A21). However, nothing in the legislative history of the Williams Act suggests that Congress intended the policy of neutrality embodied in its own legislation to preempt state laws simply because they might make tender offers more difficult.

3. In any event, the Indiana Statute is not inconsistent with any policy of neutrality that may underlie the Williams Act. Nothing in the Statute delays the commencement of a tender offer or prevents its consummation as soon as permissible

under the Williams Act. The unsupported conclusion of the Seventh Circuit that the practical impact of the Statute is to delay consummation of a tender offer for fifty days (as contrasted with the 28 day average waiting period under the Williams Act) fails to take into consideration the alternatives available to the tender offeror. Furthermore, the Indiana Statute leaves the decision on the fairness of the offer with the shareholders, a result consistent with the policy the plurality in MITE discerned in the Williams Act of letting shareholders make "their own informed choice." Edgar v. MITE, 457 U.S. 624, 634 (1982).

B. 1. The Indiana Statute, which does not regulate commerce, is not unconstitutional under the Commerce Clause. Nothing in the Commerce Clause

requires Indiana to resolve voting rights or other corporate governance issues in any particular way so long as the State does not discriminate against interstate commerce. Because Indiana has the right to determine the property right characteristics of the shares of its domestic corporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds.

2. In any event, the Statute passes constitutional muster under the test applied in "dormant" Commerce Clause cases because any incidental burden the Statute may impose on interstate commerce is not excessive in relation to the benefits it confers upon shareholders of Indiana corporations.

Pike v. Bruce Church, Inc., 397 U.S.

137 (1970). The Indiana Statute is far more narrowly drawn than--indeed it bears no resemblance to--the Illinois Act struck down in MITE. Accordingly, it does not have the "sweeping extraterritorial effect" that concerned the Court in MITE.

3. Because the Indiana Statute is addressed to the internal affairs of Indiana corporations, the provisions of the Statute of necessity apply to all shareholders of covered Indiana corporations. Indeed, no other state has the right or power to protect shareholders of Indiana corporations through the medium of laws relating to corporate governance. Thus, in performing the "local benefits analysis" of Pike v. Bruce Church, the inquiry must be whether Indiana had a legitimate

interest in enacting the Indiana Statute for the benefit of all shareholders of Indiana corporations.

4. The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of disinterested shareholders to decide whether a material change in voting control of the corporation is in its best interest. It permits shareholders to determine the intentions of any offeror concerning how it will run the business, whether it will abuse its ability to control the corporation and whether it will liquidate the company or remove it from the State. In the case of tender offers, the Statute permits shareholders to evaluate the merits of partial or two-tier offers without coercion. Shareholders confronted with a partial

or two-tier offer can collectively evaluate the merits of the whole offer without being stampeded into accepting an undesirable offer out of fear of losing an attractive initial premium.

5. No evidence was introduced in the court below that the Statute would, as a practical matter, burden interstate commerce. The Statute will not delay the commencement or consummation of tender offers, the principal such supposed burden which prompted the Seventh Circuit to strike down the Statute on Commerce Clause grounds. Moreover, the requirement of a shareholder vote should not adversely affect tender offers attractive to a majority of the disinterested shareholders since, as a practical matter, it would be in such shareholders' best interests to both

tender their shares and vote to confer voting rights.

ARGUMENT

The Indiana statute does not regulate or interfere with the acquisition--by tender offer, open market or private purchases or otherwise--of shares of the Indiana corporations it governs. Rather, it regulates the circumstances under which a person acquiring control shares of an Indiana corporation is entitled to vote them. Accordingly, the Statute deals with the corporate governance of Indiana corporations, specifically the circumstances under which a person who purchases "control shares" may use the voting power of the shares to influence or control the corporation.

This Court addressed Supremacy and Commerce Clause issues in a substantially different context in Edgar v. MITE Corp., 457 U.S. 624 (1982), in which it held the Illinois Business Takeover Act (the "Illinois Act") unconstitutional. The differences between the Illinois Act and the Indiana Statute are so great as to render MITE of limited utility in addressing the issues raised in this case:

1. The Illinois Act regulated the takeover bid process itself. 457 U.S. at 626-27. The Indiana Statute does not regulate the acquisition of shares by tender offer or otherwise, but rather regulates the internal affairs of Indiana corporations.

2. By imposing a twenty business day precommencement notification

requirement on offerors and by permitting a state-administered hearing of unlimited duration on the adequacy of the offeror's disclosure and the fairness of its offer, the Illinois Act introduced "extended delay into the tender offer process." Id. at 637. The Indiana Statute does not, either by its terms or by its practical impact, delay the commencement or consummation of tender offers for shares of Indiana corporations.*

3. The Illinois Act allowed the Illinois Secretary of State to "pass on the substantive fairness of a tender offer," which the plurality in MITE found in conflict with the approach adopted in the Williams Act. Id. at

* See infra, discussion at 62-73.

639-40. The Indiana Statute leaves with shareholders the decision of whether the offer is fair.*

4. The Illinois Act had a "sweeping extraterritorial effect" because it applied to

every tender offer . . . meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois.

Id. at 642. Accordingly, it applied even if none of the target corporation's shareholders resided in Illinois. Id. The Indiana Statute, which applies only to Indiana corporations having substantial numbers of Indiana shareholders and other significant

* See infra, discussion at 74-77.

contacts with the State, has no such sweeping extraterritorial effect.*

No evidence was introduced in the courts below concerning the practical impact of the Indiana Statute.** Nevertheless, Judge Posner made his own assessment that the Statute is a "lethal dose" for tender offers because "[v]ery few tender offers could run the gauntlet that Indiana has set up." Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986) (CTS App. A23). Aside from his unsupported (and erroneous) conclusion

* See infra, at 105-08.

** The Attorney General of Indiana did not receive certification from the District Court pursuant to 28 U.S.C. § 2403(b) until after the conclusion of the proceedings in that court and was unable to present such evidence in the action. See infra, note at 29, 30.

that the Statute imposes a fifty day delay on the consummation of tender offers, Judge Posner leaves us in the dark concerning the basis for his findings. Yet his decision that the Statute is unconstitutional on both Supremacy and Commerce Clause grounds hinges not on its subject matter but on its supposed practical impact.

I. THE INDIANA STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT.

Despite obvious "doubts of the Williams Act's preemptive intent," 794 F.2d at 262 (CTS App. A23), the Seventh Circuit struck down the Indiana Statute as unconstitutional under the Supremacy Clause. It accepted the reasoning that Congress in the Williams Act had "struck a delicate balance between the contending factions" in takeover contests that states must respect and

held that the Indiana Statute "upsets the balance struck." Id. We demonstrate below that the Williams Act does not preempt state corporate governance statutes such as the Indiana Statute simply because they may not be neutral in tender offers for corporate control. We further demonstrate that in any event the Indiana Statute is not inconsistent with any policy of neutrality which may underlie the Williams Act.

The context in which the decision on preemption must be made is respect for the authority of states to make laws -- particularly in areas traditionally governed by the states. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Few fields have been so consistently and completely occupied by

the states as the regulation of the internal affairs of their domestic corporations. Only an "unambiguous congressional mandate" would justify a finding of federal preemption of a state statute regulating shareholder voting rights. Cf. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147 (1963).

- A. The Subject Matters of the Indiana Statute and the Williams Act Are Entirely Different.

The Indiana Statute governs the voting power of "control shares," defining that term as acquired voting shares that, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power. Ind. Code Ann. § 23-1-42-1. The Statute applies regardless of the method by which the

shares are acquired -- whether by tender offer or by open market or private purchases. Only the control shares themselves, and not shares previously owned by the acquirer, are subject to the provisions of the Statute. A person who acquires control shares may not vote them until the shares are accorded voting rights by a majority vote of existing disinterested shareholders-- that is, all shareholders except the acquirer and the officers and inside directors of the corporation. Ind. Code Ann.

§ 23-1-42-9.* Corporations may, in

* The Indiana Legislature did not intend that incumbent management be permitted to vote on the voting rights issue, and the Seventh Circuit evidently construed the statute as preventing them from doing so. Dynamics, 794 F.2d at 261 (CTS App. A20). While Section 9 of the statute is ambiguous in this regard, the Legislature included

their articles of incorporation or by-laws, elect to be exempt from the

(footnote continued)

Section 9(b)(1) only to ensure the right of a class of shareholders to vote as a separate voting group if the proposed control share acquisition would result in any of the changes described in Ind. Code Ann. § 23-1-38-4(a), which relates to changing the provisions of or reclassifying classes of a corporation's stock. Intervenor-Appellant was not able to present evidence to the District Court as to the Statute's proper construction and intent, "[b]ecause the Indiana Attorney General [was not] properly certified pursuant to 28 U.S.C. § 2403(b)" Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 400 (N.D. Ill. 1986) (CTS App. A89). As the Indiana Attorney General informed the Seventh Circuit, however, CTS has only one class of common stock, and Section 9(b)(1) is thus irrelevant to any shareholder election on the voting rights issue in this case. Brief of Intervenor-Appellant State of Indiana at 9, Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986) (No. 86-1601).

provisions of the Statute. Ind. Code Ann. § 23-1-42-5.

To obtain the necessary shareholder vote, any person who "proposes to make or has made" an acquisition of control shares may deliver an "acquiring person statement" to the corporation and request a special meeting of shareholders to determine whether voting rights will be accorded. Ind. Code Ann. § 23-1-42-6. The corporation must then set a record date and hold a shareholders' meeting within fifty days to vote on this issue. Ind. Code Ann. § 23-1-42-7(a) and 8(a).

(footnote continued)

Resolution of this issue of precisely who is entitled to vote is, however, largely irrelevant to the constitutional issues posed in this case.

In sharp contrast, the Williams Act, 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1982 & Supp. III 1985) (CTS App. A141), which was adopted in 1968 as an integral part of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1982 & Supp. III 1985) (the "1934 Act"), does not purport to govern voting rights of shareholders of corporations organized under the laws of the various states. Rather, the Act requires that upon commencement of a tender offer, the offeror provide shareholders of the target company with certain information about the offer. 15 U.S.C. § 78n(d)(1); 17 C.F.R. § 240.14d-3 (1986). It requires that the offer remain open for not less than twenty business days. 17 C.F.R. § 240.14e-1(a). It also provides that

shareholders who tender their shares may withdraw them during the first fifteen days of a tender offer and, if the offeror has not purchased them, at any time after sixty days from the commencement of the offer. 15 U.S.C. § 78n(d)(5); 17 C.F.R. § 240.14d-7. All shares tendered must be purchased for the same price and on a pro rata basis if the offer is oversubscribed. 15 U.S.C. §§ 78n(d)(6) and (7). The Williams Act does not regulate purchases and sales of stock which are accomplished by means other than a tender offer. See, e.g., Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 56 (2d Cir. 1985).

- B. There Is No Conflict Between the Provisions of the Williams Act and Those of the Indiana Statute, and the Indiana Statute Is Therefore Not Preempted.
-

As the Seventh Circuit implicitly recognized, there is no conflict between the provisions of the Indiana Statute and the provisions of the Williams Act. It is possible for an acquirer to comply with the provisions of both laws when purchasing control shares of an Indiana corporation. Under such circumstances, the plain language of the federal statute being construed, the 1934 Act, requires a finding that the Indiana Statute is not preempted by the Williams Act.

Section 28 of the 1934 Act states that:

Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any

State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (1982) (emphasis added). The provisions of the Indiana Statute, which deal with the voting rights of control shares, do not conflict with the "provisions" of the Williams Act. Accordingly, the plain meaning of the language of the 1934 Act requires a finding that Congress did not intend that the policy reflected in the Act be the basis for preempting state laws not inconsistent with its actual provisions.*

* State law savings clauses are also found in each of the other federal securities statutes--the Securities Act of 1933 (15 U.S.C. § 77r (1982)), the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79u (1982)), the Trust Indenture Act of 1939 (15 U.S.C. § 77zzz (1982)), the

This Court has frequently held that the plain meaning of a statute must be given effect and that the legislative history of an unambiguous statute is almost always irrelevant:

Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language.

(footnote continued)

Investment Company Act of 1940 (15 U.S.C. § 80a-49 (1982)) and the Investment Advisers Act of 1940 (15 U.S.C. § 80b-18a (1982))--further demonstrating that the federal securities laws were not intended to preempt state laws in the absence of conflicting provisions. See generally Warren, Reflections on Dual Regulation of Securities: A Case Against Preemption, 25 B.C.L. Rev. 495 (1984).

When we find the terms of a statute unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances".

Garcia v. United States, 469 U.S. 70, 75 (1984). See also United States v. Oregon, 366 U.S. 643, 648 (1961) ("Having concluded that [its] provisions . . . are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.") (footnote omitted).

This Court should therefore find that in view of the unambiguous language of Section 28 of the 1934 Act (the only statutory expression of congressional intent on the subject), the Indiana Statute is not preempted by the Williams Act. It need not refer to the legislative history of the Act in reaching this result.

C. The Legislative History of the Williams Act Does Not Support the Proposition that It Preempts State Laws which May Affect the Ease of Consummating Tender Offers.

At a minimum, the test to be applied in determining whether the Indiana Statute is preempted by the Williams Act is "whether, under the circumstances of this particular case [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).^{*} In practice,

* State statutes fall afoul of the Supremacy Clause under one of several "preemption" tests fashioned by this Court: 1) that Congress explicitly displaced state law (e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-96 (1983)); 2) that Congress has so pervasively regulated a field that it is entirely occupied, precluding state regulation (e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230

this Court has rarely held state statutes to be preempted under the Hines test in the absence of an "actual conflict" between the state and federal statutes* or an "unambiguous congressional mandate" requiring

(footnote continued)

(1947)); or 3) that the state law "actually conflicts" with federal law either because compliance with both is a "physical impossibility" (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)), or because it falls within the Hines test. See generally Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982). The only preemption test arguably relevant in this case is the Hines test.

- * E.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 706 (1984) (state law "compels conduct that federal law forbids"); Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Board, 467 U.S. 461, 477-78 (1984) (state law "empowers producers' associations to do precisely what the federal Act forbids them to do").

preemption of the statute.*

Finding no actual conflict, the Seventh Circuit rested its preemption holding upon its conclusion that the Williams Act embodies some congressional purpose which the Statute thwarts. Despite obvious reservations "stilled" only by the "weight of precedent," the Seventh Circuit sided with the plurality in MITE in holding that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that the states may not upset." 794 F.2d at 261 (CTS App. A21) (emphasis added). In so doing the Seventh Circuit conceded that "[o]f course it is a big leap from saying that the Williams Act does not

* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-52 (1963).

itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations" Id. at 262 (CTS App. A22).

Indeed, as Judge Posner pointed out, the legislative history states that "[t]he bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." Id. (CTS App. A23) (emphasis added). No inference arises from this or other statements on the subject of neutrality in the Act's legislative history that Congress intended to preempt state laws which might make takeovers of domestic corporations more difficult. Certainly the references to neutrality fall far short of the "extraordinary showing of

contrary intentions", Garcia, 469 U.S. at 75, that would justify the Court in deviating from the plain language of Section 28 of the 1934 Act. Nor do they demonstrate the kind of "unambiguous congressional mandate" necessary to preempt the "historic police powers of the States." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1962).

This is particularly true in view of the fact that, as this Court recognized in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the neutrality of the Williams Act is "but one characteristic of legislation directed toward a different purpose -- the protection of investors."* 430 U.S.

* In support of this conclusion the Piper Court quoted testimony of

at 29. Considering that under the 1934 Act the states are free to enact legislation for the protection of investors which does not conflict with its provisions, it seems apparent that Congress had no purpose in mind other than observing a policy of neutrality in its own takeover legislation.

The Seventh Circuit's opinion itself amply demonstrates that the fundamental premise it relied upon in resolving the Supremacy Clause issue --

(footnote continued)

Manuel Cohen, then Chairman of the SEC, who stated that "the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern." 430 U.S. at 27-28 (emphasis in original).

that states may not upset the balance struck in the Williams Act -- is highly doubtful. And the "weight of precedent," which was evidently the factor which convinced the Seventh Circuit not to "reexamine" its own analysis of this issue in MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), rests on no firmer foundation.

Lower federal court rulings on the issue derive from this Court's plurality opinion in MITE, which was written by Justice White and joined in by Chief Justice Burger and Justice Blackmun. Justices Powell and Stevens refused to join the Supremacy Clause portion of Justice White's opinion, Justice Powell stating that:

[T]he Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to

assure -- at least in some circumstances -- greater protection to interests that include but often are broader than those of incumbent management.

457 U.S. at 646-47. And in similar language, Justice Stevens wrote:

I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management.

Id. at 655. Justices O'Connor, Marshall, Brennan and Rehnquist did not reach the Supremacy Clause issue.

The full Court should reject the reasoning of the plurality in MITE and should find that any principle of neutrality reflected in the legislative history of the Williams Act does not preempt state laws simply because they may have the practical effect of favoring incumbent management or

takeover bidders in tender offer contests.

- D. The Indiana Statute Relates to Corporate Governance Issues which Are Not Subject to Preemption by a Federal Statute Regulating Takeover Bids.

The Indiana Statute, dealing as it does with the voting rights of control shares, regulates the internal affairs of Indiana corporations. As this Court recognized in MITE, the internal affairs of a corporation are those matters which are "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders"

457 U.S. at 645. Voting rights of shareholders -- what matters require a shareholder vote, who is entitled to vote and the percentage vote required -- are among the corporate governance

issues that fall most clearly within the scope of the internal affairs doctrine. See Restatement (Second) of Conflict of Laws § 302, Comment b, at 306-07 and § 304 (1971). Indeed, this Court has said as much in Rogers v. Guaranty Trust Co., 288 U.S. 123, 129-30 (1933), a case involving the issuance, allotment and sale of stock and thus "the proportionate ownership of stockholders and their rights inter sese:"

When, by acquisition of his stock, plaintiff became a member of the corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of [that State's] law.

See also First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

The plurality in MITE stated that the "internal affairs" doctrine was of little use to Illinois in the context of that case. The tender offers regulated by the Illinois Act, the plurality said, "contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." 457 U.S. at 645. The internal affairs doctrine is, however, squarely applicable in this case because the statute in question does not regulate "transfers of stock," but the voting rights of control shares. As the court stated in APL Limited Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985), while the

acquisition of shares itself does not implicate the internal affairs of the target corporation, use of the power acquired as a result of the acquisition "once the shares have been acquired may well be a proper subject of state regulation" 622 F. Supp. at 1223-24 (emphasis in original).

In regulating the voting rights of control shares, the Indiana Statute is one of a family of other, more common corporate governance provisions in state business corporation laws which affect the relative ease of asserting influence or control over corporations once a substantial block of shares has been acquired. For example, states commonly require a majority or greater vote (up to two-thirds in some cases) of outstanding shares to approve corporate

changes such as mergers, sales of substantially all corporate assets or dissolution of the corporation. Because these types of changes are often used by acquirers to squeeze out minority shareholders, the need for shareholder approval has the effect of making takeovers more expensive (since a larger number of shares must be bought) and therefore less attractive. See Hochman & Folger, Deflecting Takeovers: Charter and By-law Techniques, 34 Bus. Law. 537, 547-48 (1979).

Provisions for the cumulative voting of shares are also common, and the court below recognized them as a valid form of state regulation of internal corporate affairs. Dynamics, 794 F.2d at 264 (CTS App. A27). As the Seventh Circuit acknowledged, however,

and as several commentators have pointed out, cumulative voting rights can constitute a significant deterrent to hostile tender offers. Id.; Hochman & Folger, supra, at 538-39. When coupled with a staggered or classified board of directors, cumulative voting can force the holder of a majority block of shares to wait more than two years before gaining control of the board, thus frustrating the purpose of many tender offers. Hochman & Folger, supra, at 539.

Many states also permit corporations to require a supermajority vote of shareholders (in some cases up to 80%) to approve mergers or similar transactions with major stockholders. Because of the added expense involved in obtaining a supermajority block of shares, such provisions can be a

powerful deterrent to would-be tender offerors who intend to effect a merger or to sell off the corporation's assets. See M. Lipton & E. Steinberger, Takeovers and Freezeouts § 6.03[2][b] (1986).

Another commonly used defensive technique is the fair price provision, whereby supermajority approval is required for mergers or similar transactions with a major shareholder unless that shareholder offers minority shareholders a certain minimum price for their shares. Similarly, mandatory redemption provisions give shareholders the right to demand a minimum price for their shares once a tender offeror has acquired a threshold percentage of shares. Hochman & Folger, supra, at 555-56. These types of provisions are

consistent with the business corporation laws of most states and are being adopted with increasing frequency by corporations seeking to discourage or delay takeovers. M. Lipton & E. Steinberger, supra, at § 6.03[2][c].

Even measures designed solely to prevent or discourage hostile takeovers, such as poison pill provisions, are generally permitted by state law. E.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). As the court below conceded (while acknowledging a personal bias against such provisions), these matters are nevertheless "committed to the authority of the states. . . ." Dynamics, 794 F.2d at 255-56 (CTS App. A10).

All state business corporation laws except Hawaii follow the lead of the Model Business Corporation Act on the subject of voting rights which provides in Section 7.21(a) that "unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting." Revised Model Bus. Corp. Act § 7.21(a) (1985) (emphasis added). See, e.g., Ind. Code Ann. § 23-1-30-2(a). Courts have recognized that such statutes permit corporations to restrict the voting rights of shareholders so that, for example, no one shareholder can vote more than a prescribed percentage of the outstanding stock. In Providence and Worcester Co. v. Baker, 378 A.2d 121

(Del. 1977), the Delaware Supreme Court held that § 212(a) of the Delaware Corporation Code, Del. Code Ann. tit. 8, § 212(a) (1983), containing language similar to the Model Act, validated a corporation's charter provision limiting shareholders to one vote per share up to fifty shares and one vote per twenty shares owned in excess of that amount and eliminating voting rights for shares owned in excess of 25% of those outstanding. Responding to the argument that the charter provision was unenforceable because all shares of stock within the same class must have uniform voting rights under Del. Code Ann. tit. 8, § 151(a), the Court stated that:

[t]he voting power of the stock in the hands of a large stockholder is not differentiated from all others in its class; it is the personal

right of the stockholder to exercise that power that is altered by the size of his holding.

378 A.2d at 123. See also Deskins v.

Lawrence County Fair & Development

Corp., 321 S.W.2d 408 (Ky. 1959)

(corporate charter provision restricting all stockholders to a maximum of four votes at shareholders' meetings held valid). Such statutes can be of significant help in structuring the voting rights of a corporation's shareholders so as to make takeovers impracticable.* See Note, Delaware Resurrects the Common Law: Affirmation of Contractual Voting Restrictions

* Like provisions of state business corporation laws permitting corporations to vary the one share-one vote formula of voting power, the Indiana Statute is voluntary. Indiana corporations

Within a Class of Stock, 4 Del. J. Corp.
L. 154, 172 (1978).

Indiana's Business Corporation Law includes many of the above provisions such as cumulative voting, (Ind. Code Ann. § 23-1-30-9); provisions permitting the issuance of special classes of stock which can be used to give existing shareholders costly redemption rights in the event of a change of control (Ind. Code Ann. § 23-1-27-1); provisions giving

(footnote continued)

have the right to elect to be exempt from the Statute by adopting a charter provision or by-law. Ind. Code Ann. § 23-1-42-5. While the Statute requires a corporate decision to decline coverage, it is nevertheless optional.

appraisal rights to dissenters in any merger (Ind. Code Ann. § 23-1-44-1 to -20); and provisions conditioning any merger, sale of substantially all of the assets or dissolution of the corporation upon a majority vote of the shareholders. Ind. Code Ann. §§ 23-1-40-3; 23-1-41-2 and 23-1-45-2. These provisions, and the others discussed above, can hardly be characterized as neutral in the battle between tender offeror and management; in fact, they are regarded as, and in some cases are intended to be used as, defensive tools against hostile takeovers. See generally M. Lipton & E. Steinberger, supra; Hochman & Folger, supra.

Under the reasoning of the Seventh Circuit, however, these and other similar state laws governing internal affairs will be subject to constitutional attack on the ground that they are not neutral in the battle between aggressor and target for corporate control. The effect of the opinion below is thus to federalize a significant portion of the law relating to internal corporate affairs in contravention of the policies this Court has followed in such cases as Cort v. Ash, 422 U.S. 66 (1975), where the Court stated in an analogous context that:

Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of

directors with respect to stockholders, state law will govern the internal affairs of the corporation.

422 U.S. at 84 (emphasis added).

See also Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.").

E. The Indiana Statute Does Not Violate Any Policy of Neutrality in Tender Offer Contests which May Be Imposed by the Williams Act upon the States.

The Indiana Statute reflects state policy that disinterested shareholders of Indiana corporations should have a voice in so fundamental a

corporate event as the assumption by an acquirer of voting control over a substantial block of the corporation's stock. By preventing the acquirer and the officers and inside directors from voting on the issue of whether the control shares will carry voting rights, the Statute places this decision where it belongs--in the hands of disinterested shareholders who can decide the issue based upon their own self-interest. The Statute's requirement of a shareholder vote to confer voting rights on control shares is fully consistent with any policy of neutrality which may underlie the Williams Act.

1. The Indiana Statute Does Not, Even as a Practical Matter, Impose a Fifty Day Waiting Period Upon Consummation of an Acquisition of Control Shares.

The Illinois Act imposed a twenty business day precommencement notification requirement on tender offerors. In finding that this provision of the state law upset the balance established by the Williams Act, the plurality in MITE stated that:

[B]y providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.

MITE, 457 U.S. at 635 (emphasis added). Similarly, in holding that the Indiana Statute is preempted by the Williams Act, the Seventh Circuit speculated that as a practical matter the Indiana

Statute imposes a fifty day delay upon an acquirer wishing to consummate an acquisition of control shares -- a reference to the period within which the corporation must hold a shareholders' meeting to consider voting rights.* There is no basis whatsoever for this conclusion.

Significantly, nothing in the Statute prevents an acquirer from making

* As Judge Posner put it, "[t]he effect of the Indiana statute is . . . to impose a 50 day delay on tender offers at the option of the target firm. . . . The offeror dare not accept the tendered shares till the stockholders' meeting is held, since if he loses the vote on voting rights he will end up with nonvoting shares and will not be able to control the corporation--the main purpose of most tender offers. So he must hold the offer open for 50 days, rather than the 28 days required (on average) by the SEC's regulations under the Williams Act." Dynamics, 794 F.2d at 261 (CTS App. A20).

an offer to purchase control shares that entitles him to accept tendered shares for payment as soon as permissible under the Williams Act.^{*} As the offer can be made simultaneously with delivery of an acquiring person statement to the target corporation, nothing in the Indiana Statute delays commencement of the offer, an aspect of the Illinois Act the plurality in MITE found could be detrimental to stockholders.

Shareholders to whom the offer is addressed may immediately tender their shares to the offeror's escrow agent, and the offeror may accept them for

* The Williams Act contains a 20 business day (or approximately 28 calendar day) minimum waiting period during which an offer must be kept open.

payment after passage of the Williams Act's twenty business day waiting period.

Should the offeror wish protection against the obligation to pay for the shares taken up in the event of an adverse shareholder vote on the voting rights issue, he can provide in the tender offer materials that tendered shares will be accepted for payment subject to the condition that the shares are accorded voting rights within a specified period of time. It is not unusual for tender offer materials to provide for the acceptance of tendered shares for payment conditioned upon the happening of a subsequent event. The need to condition acceptance for payment usually arises in situations where the tender offer cannot be consummated in the absence of some required state or

federal regulatory approval. Indeed, so common is the practice of conditioning acceptance for payment that the SEC has provided guidance on the subject in its Interpretative Release Relating to Tender Offer Rules, Exchange Act Release No. 34-16623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,284 I, at 17,758 (March 5, 1980) ("Nothing in the rules prohibits offers under the terms of which the acceptance for payment is conditioned upon fulfillment of a condition requiring regulatory approval.") The Release makes clear that the same principle applies to other types of conditions as well.

The United States Court of Appeals for the Second Circuit recognized this procedure as appropriate under the Williams Act in MacFadden

Holdings, Inc. v. JB Acquisition Corp.,
802 F.2d 62, 70 (2d Cir. 1986). There
the tender offer materials provided that
the offeror was entitled to accept
tendered shares for payment subject to
later obtaining approval from the
Federal Communications Commission to
consummate the purchase of the shares.
After the offeror's conditional
acceptance of the shares for payment,
tendering shareholders lost their
withdrawal rights, and the offeror was
assured of its ability to purchase the
stock subject only to obtaining the
necessary regulatory approval. Under
the Indiana Statute an offeror can
follow precisely the same procedure,
accepting tendered shares for payment on
the first day acceptance is permitted
under the Williams Act (and thereby

terminating shareholders' withdrawal rights), conditioned upon a favorable outcome of the shareholder election on voting rights.

Further support for Indiana's position in this regard is found in the SEC's defense of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") which has the potential for delaying the consummation (but not the commencement) of tender offers. In its Brief as Amicus Curiae in MITE, the SEC stated:

Unlike the Illinois statute--which delays indefinitely the commencement of a tender offer until the bidder has complied with the statute's pre-commencement filing and review provisions -- the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, merely precludes a bidder from purchasing tendered shares until it has received clearance from the Federal Trade Commission and the Department of Justice, both of which must act within a carefully limited time

frame. 15 U.S.C. § 18a(a). It does not delay the commencement of the offer or the tendering of shares to the bidder's escrow agent.

Moreover, the Hart-Scott-Rodino Act does not require, as does the Illinois statute, that the bidder make a public announcement of the material terms of its offer in the pre-commencement period.

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Commission as Amicus Curiae at 19, Edgar v. MITE, 457 U.S. 624 (1982) (No.

80-1188) (emphasis added). Thus, the SEC has defended the compatibility of the HSR Act with the Williams Act despite the fact that it can impose substantial delays upon the consummation of a tender offer following its commencement.*

* Under the regulations promulgated pursuant to the HSR Act of 1976, 15 U.S.C. § 18a (1982), tender offerors subject to the Act must file a Notification and Report Form with the Federal Trade Commission upon commencement of the offer. The

As a matter of procedure, a tender offeror could commence a tender offer and file the acquiring person statement required by the Statute with the target corporation the same day. The target corporation would be required

(footnote continued)

offer is then subject to a thirty day waiting period (or, in the case of a purely cash tender offer, fifteen days) within which the Commission evaluates the tender offeror's submission. 16 C.F.R. § 803.10 (1986). Before the lapse of this thirty days, the Commission may request additional information or documentary material from the tender offeror. 16 C.F.R. § 803.20(a). Until the tender offeror has submitted the documentation required by the second request, the waiting period is tolled, further delaying the offer. Once the new information is filed, the Commission has a further period of twenty days (or, in the case of a purely cash tender offer, ten days) to pass on the offer or to seek judicial intervention to prevent its consummation. 16 C.F.R. § 803.20(c).

to call a shareholders' meeting to be held within fifty days and to set a record date for shareholders entitled to vote at the meeting.* Only shareholders of record are entitled to vote at shareholder meetings of Indiana corporations, and thus those who tendered their shares after the record date in response to the offer would be entitled to vote on the issue of whether to confer voting rights on the control shares sought. See Ind. Code Ann. § 23-1-29-7. Immediately after the minimum waiting period which the SEC has prescribed under the Williams Act, and before the shareholders' meeting, the offeror could conditionally accept all shares tendered for payment as discussed

* See Ind. Code Ann. §§ 23-1-29-5(d) and 7.

above. Tendering shareholders would thereupon lose their withdrawal rights, and the offeror would have the shares locked up. However, the offeror would not be required to pay for the shares unless they received voting rights as specified in the tender offer materials.

Given a properly structured offer, the Indiana Statute does not give the target company "additional time within which to take steps to combat the offer," MITE, 457 U.S. at 635, an evil the plurality in MITE identified in the Illinois Act. Nor does the Statute require the offeror to assume any risk in the event of an adverse shareholder vote. Thus, the Seventh Circuit's conclusion that the Statute "impose[s] a 50 day delay on tender offers" fails to

consider the practical alternatives open to the offeror.

Tender offerors and their professional advisers are undoubtedly in possession of sufficient experience and expertise to predict the price and terms required in given circumstances to prompt a majority of disinterested shareholders to tender their shares. It seems self-evident that if the majority of the shareholders wishes to sell its shares at the price offered, it will vote to confer voting rights on the control shares sought. Thus, there is no basis for Judge Posner's speculation that the "tenderer mercies of the 'disinterested' shareholders" may operate to frustrate tender offers.*

* This phrase is a reference to the fact that, according to Judge

2. The Indiana Statute Is
Consistent with the Policy
Embodied in the Williams Act.

In any event, this criticism of the Statute is wide of the mark. The one certain purpose of the Williams Act is to protect shareholders.* A statute which gives shareholders the opportunity to vote as a group on the issue of the change of control represented by a control share acquisition gives shareholders important new rights as

(footnote continued)

Posner, the Illinois Act put the tender offeror at the "mercy of the Illinois Secretary of State" and seems to embody his belief that the disinterested shareholders would be more receptive than the Secretary to tender offers. Dynamics, 794 F.2d at 263 (CTS App. A23).

* See supra, discussion at 42-43.

against both aggressor and incumbent management.

Seen in its proper light, the Indiana Statute is consistent with the policy, which the plurality of this Court discerned in the Williams Act, of letting shareholders make their "own informed choice." MITE, 457 U.S. at 634. Whether offerors elect to purchase control shares before or after a vote by the disinterested shareholders on the voting rights issue, the majority of these shareholders themselves will decide the issue of whether the offer is attractive.

That the Indiana Statute in fact maintains the balance among offerors, shareholders and incumbent management in battles for corporate control is demonstrated by the fact that

for the first time a state has given offerors the absolute right to obtain an immediate shareholder vote on the merits of their offers. Incumbent management is required to hold the election but cannot vote its own shares. The effect of this is likely to be that incumbent management will be less able to wage war against an offer the majority of shareholders wishes to accept. Once the disinterested shareholders have voted in favor of an offer, management should be dissuaded from continuing to fight. It certainly would not be able to justify its continuing opposition, as many have in the past, on the ground that a tender offer is inherently coercive and that shareholders are left with no real choice but to tender their shares. Under the Indiana Statute the will of

the majority expressed at a shareholder meeting will constitute an irrefutable demonstration of the shareholders' wishes.

Because the Indiana Statute does not have the effect of delaying tender offers and because the requirement of a shareholder vote on the issue of the voting rights of control shares cannot be said to favor either incumbent management or offeror, the Indiana Statute does not upset any balance struck between them in the Williams Act.

II. THE INDIANA STATUTE DOES NOT VIOLATE THE COMMERCE CLAUSE.

The second question on appeal to this Court is whether the Indiana Statute violates the Commerce Clause. Significantly, the Statute does not regulate commerce, but only the voting

rights to be accorded to control shares acquired in Indiana corporations.

A. Indiana May Determine the Voting Rights of Shareholders of Its Domestic Corporations Free of Constitutional Restraint.

Nothing in the Commerce Clause requires Indiana to resolve voting rights or other corporate governance issues in any particular way so long as the State does not discriminate against interstate commerce. Nor is the Indiana Statute subject to attack based upon a court's assessment of its "economic wisdom" or "ultimate economic efficacy." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1977).

As developed more fully in the brief of Appellant CTS Corporation, because Indiana has the right to determine the property right characteristics of the shares of its

corporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds. The "market for corporate control" which Judge Posner identified in his opinion is one whose very existence depends upon the state laws defining shareholders' property rights and ownership interests. See Louisville & Nashville Ry. Co. v. Kentucky, 161 U.S. 677, 702-03 (1896); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

B. In Any Event, the Indiana Statute Is Constitutional under the Test Enunciated in Pike v. Bruce Church, Inc.

If relevant at all, the test to be applied in ruling on the "dormant" Commerce Clause issue presented is that

set out in Pike v. Bruce Church, Inc.,
397 U.S. 137, 142 (1970):

Where the statute regulates
evenhandedly to effectuate a
legitimate local public interest,
and its effects on interstate
commerce are only incidental, it
will be upheld unless the burden
imposed on such commerce is clearly
excessive in relation to the
putative local benefits.

Application of this balancing test
demonstrates that the Indiana Statute
was a proper exercise of the State's
authority to pass laws relating to the
internal affairs of its domestic
corporations.

1. The Indiana Statute Does Not
Discriminate Against Interstate
Commerce.

Because the provisions of the
Statute apply whether the control shares
are acquired by a resident or a
non-resident and whether in intrastate
or interstate commerce, the Indiana

State "regulates evenhandedly," and does not have even the incidental effect of discriminating against interstate commerce. Id. And, as this Court indicated in Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) (plurality opinion), state laws which do not discriminate against interstate commerce are entitled to "special deference."*

2. The Indiana Statute Effectuates a Legitimate State Interest, and Its Benefits Outweigh Any Incidental Burden on Interstate Commerce.

The Indiana Statute is unquestionably addressed to the corporate governance, and hence to the internal

* See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-26 (1978); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960).

affairs, of Indiana corporations. This Court stated in Kassel that:

The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern.

450 U.S. at 670, (emphasis added).

Like laws and regulations adopted under a state's police power addressed to health and safety concerns, laws governing the internal affairs of a state's domestic corporations are clearly addressed to "matters traditionally of local concern" within the meaning of Kassel. See, e.g., Cort v. Ash, 422 U.S. 66 (1975).

As the plurality recognized in MITE, under the internal affairs doctrine the rights inter sese of shareholders in Indiana corporations are

determined exclusively by Indiana law:

The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs -- matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders -- because otherwise a corporation could be faced with conflicting demands.

457 U.S. at 645. For this reason, no other state has the right or the power to protect shareholders of Indiana corporations through the medium of laws relating to corporate governance.*

* Prompted by the obvious need for uniform resolution of internal affairs questions affecting such matters as voting rights of shareholders, validity of stock issuances, relative rights of shareholders, election of directors, ability to effect mergers and other organic changes and the duties of officers, directors and controlling shareholders to the corporation and its shareholders, courts almost invariably decide these questions by

Moreover, as a corollary to the internal affairs doctrine, in purchasing stock of an Indiana corporation, the acquirer "impliedly agree[s] that in respect of its internal affairs the company [is] to be governed by the laws of [that] state." Rogers v. Guaranty Trust Co., 288 U.S. 123, 129 (1933).

Indiana cannot, as a practical matter, enact corporate governance provisions which apply only to Indiana residents. Without simultaneously protecting nonresident shareholders, the State would in many instances be unable to protect resident shareholders. Such

(footnote continued)

applying the incorporating state's law, regardless of where the operative facts occurred. See, e.g., Restatement (Second) of Conflict of Laws § 302, Comment b, at 306-07 and § 304 (1971).

is the case with the Indiana Statute because voting rights cannot, by their nature, vary depending upon the address of the shareholder.

Where the internal affairs of its domestic corporations are concerned, Indiana thus has a legitimate interest in protecting both resident and nonresident shareholders. Indeed, if Indiana does not protect nonresident shareholders in corporate governance matters, no other state is in a position to do so. Indiana, in effect, receives consideration from other states for protecting shareholders of Indiana corporations residing within their borders. Other states, through their own business corporation laws, protect Indiana residents who are investors in their domestic corporations.

It follows inexorably that Indiana has a legitimate interest in protecting all shareholders of its domestic corporations in matters relating to corporate governance and not just those residing in Indiana. Thus, in performing the "local benefits" analysis of Pike v. Bruce Church, the inquiry must be whether Indiana had a legitimate interest in enacting the Indiana Statute for the benefit of all shareholders of covered Indiana corporations and whether its putative benefits justify any incidental burden imposed on interstate commerce.*

* The Statute is not applicable to the voting rights of control shares unless at least 10% of the shares of the corporation are held by Indiana residents, 10% of the shareholders are Indiana residents or 10,000 shareholders reside in Indiana. Quite apart from the substantial

The internal affairs doctrine is, of course, much more than a principle of conflict of laws. The federal government has never adopted a national corporation code, but has left the development of business corporation laws to the states. This Court has respected the autonomy of the states in regulating all aspects of corporate organization and government, which are matters traditionally of local concern. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977). Maintenance of the proper relationship between the

(footnote continued)

benefits to nonresidents, these threshold percentages ensure that the Statute confers local benefits sufficient to survive any Commerce Clause challenge in view of the minimal effect it should have on interstate commerce.

federal and state governments requires that great deference be given to the decisions reached by state legislatures regarding regulation of their domestic corporations.

The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of the disinterested shareholders to determine whether a material change in voting control of the corporation is in its best interests. In regulating this aspect of corporate governance, the Statute is but an extension of other provisions of the Indiana Business Corporation Law which require shareholder approval of fundamental changes in the corporation, such as a merger with another corporation (Ind. Code Ann. § 23-1-40-3); a sale of

substantially all of its assets (Ind. Code Ann. § 23-1-41-2); or a dissolution of the corporation (Ind. Code Ann. § 23-1-45-2).

The Indiana Statute permits shareholders to evaluate the intentions of an offeror seeking a controlling block of shares to determine whether he will use his voting power in the best interests of the minority shareholders. Whether a shareholder's interests are served by accepting an offer which may result in the purchase of less than all of his shares depends upon how the new controlling shareholder will run the business and whether he will abuse his ability to control the corporation.

Indiana also has a strong interest in the welfare of employees of Indiana corporations with headquarters,

factories or other operations in the State. The Statute permits shareholders (who may also be community residents or employees or suppliers of the corporation) to determine the intentions of any offeror concerning the liquidation of the company or its possible removal from the State.

Shareholders may also want to consider the serious adverse effects hostile takeovers can have on employee morale.

Coffee, Regulating the Market for

Corporate Control: A Critical

Assessment of the Tender Offer's Role in

Corporate Governance, 84 Colum. L. Rev.

1145, 1241-42 (1984).

If so inclined, the shareholder may vote against conferring voting rights on the control shares in an effort to prevent drastic changes in the

conduct of the business which would adversely affect the company or the community. See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 912 (8th Cir. 1985) (recognizing that a requirement of Minnesota law that a tender offeror provide information as to the "impacts on the state or its residents of the takeover" was a local benefit because shareholders may wish to take these matters into consideration in deciding whether to tender their shares).

In the case of tender offers, the practical effect of the Statute should be to permit shareholders to evaluate their merits without coercion. Tender offers are frequently structured as partial or two-tier offers with cash for an initial percentage of the corporation's shares and a later

component of consideration of questionable value for the remaining shares (such as high risk corporate bonds). Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission Action, Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. ¶ 83,637 (June 21, 1984) at 86,915 n.1.

In many partial or two-tier offers, the initial premium offered to shareholders is substantial, but the second-tier price is considerably lower, resulting in an overall premium that is unfavorable to shareholders. Although it may be in the best interests of all shareholders to collectively reject such an offer, individual shareholders are likely to reason that it is in their own best interest to tender their shares.

As isolated individuals, they cannot control the outcome of the offer; if the offer is successful, those who have tendered their shares will receive the higher premium on at least a pro rata basis. Those who have not tendered, on the other hand, will be left with shares of a much lower value.* Bradley,

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- * The SEC has likened this phenomenon to the "prisoner's dilemma," where two suspects are separately interrogated by the police. Each suspect is told that if he confesses and the other does not, he will be released and his partner will receive the maximum sentence. If the other suspect confesses and he does not, however, he will receive the maximum sentence and the other prisoner will go free. If both confess, each will receive a lenient sentence. Although both suspects could remain free by refusing to confess, their individual self-interest and inability to control the other party's actions will lead them to confess. Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission

Interfirm Tender Offers and the Market for Corporate Control, 53 J. Bus. 345, 356 (1980). Statistics support the conclusion that two-tier offers are inherently coercive, since shareholders receive substantially lower premiums in successful two-tier offers than in "any or all" offers. Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission Action, Sec. Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,637 (June 21, 1984). The Indiana Statute permits shareholders confronted with a partial or two-tier offer to collectively

(footnote continued)

Action, Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83, 637 (June 21, 1984).

evaluate the merits of the whole offer without being stampeded into accepting an undesirable first step offer out of fear of losing an attractive initial premium that other shareholders will receive if the offer is successful.

In those cases where the offeror elects to proceed by means of a conditional tender offer, the Indiana Statute will have a practical effect analagous to that of legislation in the United Kingdom which requires majority shareholder approval of tender offers. The British regulations allow shareholders to simultaneously tender their shares and vote for or against the offer. If a majority votes against the offer, tendered shares are returned to the shareholders and the tender offer cannot go forward:

Under the City Code, a letter of transmittal by which target company shareholders respond to an offer must provide an opportunity to approve or disapprove an offer for less than all of the outstanding shares. The tender offer reply form thus permits the shareholder to exercise two choices in response to the bid. First, the shareholder may tender or not tender shares that are the subject of the offer. Second, the shareholder is permitted to vote for or against the offer. If a majority of the shareholders vote against the offer, the shares will be returned and the bid will not be permitted to proceed. Thus, in the case of a partial offer, including an explicit two-tier priced offer, a shareholder may tender shares and vote against the transaction at the same time.

Id. at 86,919 (footnote omitted).

As the SEC has noted, "[t]his type of provision appears to eliminate effectively the perceived coercive aspects of the two-tier bid that have evoked concern. A shareholder who is not satisfied with the price of the offer, but who feels compelled to tender

shares into the first step tender offer, may at the same time protect his or her position by voting against the offer."

Id. at 86,919.

For the foregoing reasons, the Indiana Statute confers substantial benefits on shareholders of Indiana corporations. These benefits are entitled to great weight in applying the balancing test of Pike v. Bruce Church.

3. The Burden, if any, of the Indiana Statute upon Interstate Commerce Is Minimal.

It is obvious from the provisions of the Indiana Statute that it does not prohibit or regulate interstate commerce in shares of Indiana corporations. The Statute does not affect the voting rights of shares other than control shares. Moreover, anyone purchasing control shares for investment

may buy the shares and file an acquiring person statement without requesting a shareholders' meeting to determine his voting rights. While such an investor would be unable to vote the control shares acquired, he would be entitled to the full economic benefits of the shares and would be free to sell them to third parties. In the hands of a subsequent purchaser, the shares would carry voting rights unless that purchase was itself a control share acquisition.

a. The Statute Does Not Impede Commerce in Corporate Control.

The Seventh Circuit premised its Commerce Clause ruling upon a belief that the Statute impedes "commerce in corporate control." 794 F.2d at 264 (CTS App. A26). We have demonstrated above, however, that the Indiana Statute does not delay the commencement or

consummation of tender offers or prevent an offeror from acquiring control shares on the same timetable and using essentially the same procedures that have become common in contests for corporate control.* The only difference is that instead of being able to obtain voting rights with respect to control shares automatically upon consummation of the tender offer, the tender offeror must await the result of an expedited shareholders' meeting in which those disinterested shareholders to whom the offer is being made will decide that issue by majority vote.

There is no evidence in the record, nor any reason for concluding, that the necessity for such a

* See supra, discussion at 62-73.

shareholder vote will deter tender offers for control shares of Indiana corporations, reduce the prices offered for shares in such transactions or otherwise burden or inhibit interstate commerce in such shares. There is, in fact, considerable support for the opposite conclusion, as legislation regulating tender offers has historically had a marginal effect on the volume and outcome of tender offers. See M. Lipton & E. Steinberger, Takeovers and Freezeouts § 1.01 [3] n.4 (1986); Jarrell & Bradley, The Economic Effects of Federal and State Regulation of Cash Tender Offers, 23 J.L. & Econ. 371, 401 (1980). State regulation has not deprived shareholders of the opportunity to obtain premiums for their shares in tender offers, but rather has generally

led to a substantial increase in the premiums offered. Jarrell & Bradley, supra, at 390. The Indiana Statute, if allowed to stand, may have a similar effect as tender offerors would be required to price the offer attractively enough to obtain the necessary majority shareholder vote.

This Court, in reviewing the Seventh Circuit's decision, is free to form its own conclusions concerning the "practical impact" of the Indiana Statute upon interstate commerce. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). In making its review, the Court should consider, as discussed above, that the Indiana Statute may well have the effect of truncating many tender offer battles between aggressor and incumbent management -- a result which

would enhance interstate commerce in control shares. The Court may take judicial notice of the fact that bitterly fought takeover battles often last many months. Under the Indiana Statute the aggressor is in the unique position of being able to force a shareholders' meeting and thereby take the issue directly to the shareholders on an expedited basis. In the face of a favorable vote of the shareholders on an offer or proposed offer, management should be reluctant to continue the battle.

In fact, if the Statute is allowed to stand offerors may wish to adopt the strategy of filing an acquiring person statement containing the proposed offer and refraining from incurring the expense of the tender

offer itself (with its accompanying litigation), until after the disinterested shareholders have spoken. After the election, the offer, which might otherwise have taken months and consumed millions of dollars in legal and other professional fees, may be able to proceed without management opposition.

As the foregoing demonstrates, the provisions of the Indiana Statute should not hinder, and in many cases may actually facilitate, the purchase of control shares pursuant to offers which are attractive to the majority of a corporation's shareholders. Tender offerors and others interested in acquiring control shares for the purpose of controlling or influencing a corporation are capable of taking advantage of the benefits of the Indiana

Statute and of eliminating any delay in consummating an offer -- all without incurring the risk of buying non-voting stock.

For these reasons it was error on the part of the court below to hold the Statute unconstitutional on Commerce Clause grounds. The court's principal reason for reaching the conclusion that the Statute would hinder tender offers was its belief, which we have shown to be wrong, that it imposes a fifty day delay on consummation of such offers. The requirement of an election of the disinterested shareholders cannot, by itself, support a finding that commerce is burdened by the Statute. As a practical matter, if a majority of the disinterested shareholders considers the tender offer attractive, the offeror

will receive the requisite shareholder vote to confer voting rights on the control shares. If a majority does not consider the offer attractive, it deserves to fail. Accordingly, any incidental effect the Indiana Statute may have on interstate commerce in control shares is minimal.

- b. The Indiana Statute Does Not Overlap with Other State Laws and Will Therefore Not Stifle Acquisitions of Control Shares.

The Indiana Statute is far more discriminating in its application than the Illinois Act struck down in MITE. The Statute applies only to corporations organized under the laws of Indiana with 100 or more shareholders and which have their principal places of business, principal offices or substantial assets within Indiana. In addition, subject corporations must have more than ten

percent of their shareholders resident in Indiana, more than ten percent of their shares owned by Indiana residents or more than 10,000 shareholders resident in Indiana. Ind. Code Ann. § 23-1-42-4(a).

This Court in Brown-Forman Distillers Corp. v. N.Y. Liquor Authority, 476 U.S. ___, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), stated that the MITE Court's Commerce Clause objections to the Illinois Act were premised on "the likelihood that a seller will be subjected to inconsistent obligations in different states." 476 U.S. at ___, 90 L. Ed. 2d at 562-63. Professor Levmore has summarized the MITE decision similarly:

[T]he Court emphasized this concern with potentially overlapping state schemes by distinguishing a state's regulation of the 'internal affairs

of a corporation incorporated under its laws' from the Illinois statute. The Court argued that the former generates no overlap and ensures that a corporation will not face conflicting state demands. . . . Some [state statutes] generate very little 'direct' interference with interstate commerce because no more than one state can claim jurisdiction. . . . If a state's takeover statute applies only when target companies are incorporated in the state and have their principal place of business in-state, then, at most, only one state's statute would apply to any one company.

Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563, 621 and n.235 (1984) (emphasis in original).

The Indiana Statute is responsive to these concerns expressed in MITE. It does not purport to regulate foreign corporations doing business in Indiana, and under the internal affairs doctrine there is no risk of overlap with the laws of other

states which might require offerors to comply with conflicting laws in proceeding with a tender offer. Thus, the Statute does not have the "sweeping extraterritorial effect" which led the plurality in MITE to conclude that if the Illinois Act were upheld, interstate commerce in securities transactions generated by tender offers would be "thoroughly stifled." 457 U.S. at 642.

CONCLUSION

The Indiana Statute is a measured and proportionate corporate governance statute which has been narrowly drawn to further the State's legitimate interest in protecting shareholders of its domestic corporations. As it does not conflict with the provisions or policy of the Williams Act and does not place any

significant burden on interstate commerce, this Court should reverse the judgment of the court below.

December 4, 1986.

Respectfully submitted,

John F. Pritchard
Counsel of Record for
Intervenor-Appellant
Gilbert R. Hoy, Jr.
Peter E. Mahoney
James A. Meade
of
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005
(212) 943-0700